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Supreme Court, U.S.
FILED

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No. 07-1031

OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES *EX REL.* JEFFREY P. GOLDSTEIN

Petitioner(s)

v.

FABRICARE DRAPERIES, INC., *ET AL.*

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[DATE STAMP]

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v. Civil No. JFM-00-3459

LEONARD'S DRAPERIES, INC., ET AL.

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ORDER

For the reasons stated in the accompanying memorandum, it is, this 8th day of October 2002

ORDERED

1. The motions to dismiss filed by defendants ADM International, Inc., and Contact Decor, Inc. are granted;

2. The complaint is dismissed in its entirety for failure to comply with Fed. R. Civ. P. 9(b); and

3. Plaintiff is granted 21 days in which to file an amended complaint.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

[DATE STAMP]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[DATE STAMP]

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v. Civil No. JFM-00-3459

LEONARD'S DRAPERIES, INC., ET AL.

******

[DATE STAMP]

MEMORANDUM

Plaintiff has instituted this action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. Two of the defendants, ADM International, Inc., and Contract Decor, Inc., have filed motions to dismiss on the ground that the complaint fails to satisfy the requirements of Fed. R. Civ. P. 9(b).[1] The motions will be granted. Further, since plaintiffs allegations are insufficient under Rule 9(b) as to the other defendants as well, I will order that the complaint be dismissed in its entirety but grant leave to plaintiff to file an amended complaint.

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[1]Contract Decor also challenges the sufficiency of plaintiffs allegations concerning personal jurisdiction and venue as well as plaintiff's standing to pursue this action under §3730(d)(3) of the FCA. ADM likewise challenges plaintiffs venue allegations and his standing. Another defendant, Leonard's Draperies, Inc. has also filed a motion raising the standing issue. I need not decide these issues until and unless plaintiff files an amended complaint complying with Fed. R. Civ. P. 9(b).

Plaintiff is Jeffrey P. Goldstein, the former president and owner of Commercial Drapery Contractors. Inc. Goldstein and his company werc engaged in the sale and installation of draperies, curtains, vertical and Venetian blinds, bedspreads, and related hardware and accessories, to the United States government. Goldstein was indicted and convicted of defrauding the government in connection with the sales. He has initiated this action and several others, alleging that other companies in the industry engaged in the same type of conduct for which he was indicted and convicted.

Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiff contends that the complaint satisfies Rule 9(b) because it specifies:

> • numbers and dates of Government solicitations in issue;
>
> • numbers, dales, and or effective periods of. . . [the defendants'] contracts in issue;
>
> • the ... [defendants'] proposals in issue;
>
> • the particular forms and documents within each ... proposal that contain false information;
>
> • the specific information on the identified forms and pages that is false, and the reason why the specified information is false;
>
> • and the manner in which ... [defendants] then exploited ... [their] tainted contracts, i.e., ... [their] submission of false payment claims at inflated prices.

While on their face plaintiff's allegations may seem specific, the specificity is illusory. Plaintiff does provide particulars concerning how government contracts in the industry are bid and how the contracts are written. However, after reciting generic terms of the bid and contract documents, he simply makes a conclusory allegation that matters the defendants represented in those documents were false and fraudulent. As the basis for his knowledge of the alleged deception, plaintiff claims that "[b]y virtue of his positions and experience in the industry, . . . [plaintiff] has personal knowledge of ... [defendants'] operations." It may be that plaintiff does have personal knowledge or how participants in the relevant industry conduct their operations. That fact alone, however, does not provide any basis for inferring that the plaintiff knows or has reason to believe that a particular company has engaged in fraud.

In his opposition memorandum plaintiff cavalierly states that each defendant "need only open its file drawer, remove the specified ... proposals and contracts, turn to the specified pages therein, read the specified representations on these pages, and then prepare an Answer that admits or denies the allegations that these particular representations are false." That argument betrays a disregard for the purposes of Rule 9(b), which the Fourth Circuit has defined as follows:

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of ... Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally,

> Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc., 755 F. Supp. 1055. 1056-57 (S.D.Ga. 1990)).

Here, plaintiff's allegations might be sufficient, as plaintiff contends, to enable defendants to prepare an answer. However, to countenance the conclusory allegations plaintiff has made would not protect the defendants from a frivolous suit, prevent them from being subjected to a fraud action in which plaintiff learns all of his facts after discovery, or protect them from harm to their good will and reputation.

It may be that plaintiff does have knowledge of illegal activity in which the defendants engage because there was an industry-wide conspiracy of which he was a part. Plaintiff does not, however, so allege. Were he to do so, and specifically allege the reasons for his belief that a particular defendant was part of the conspiracy, he might be entitled to greater latitude in not identifying each and every specific misrepresentation he contends the defendant made.[2] However, in the absence of any such allegations, there is no basis for inferring from the allegations that have been made any "circumstances" of fraud at all, as required by Rule 9(b). Plaintiff cannot

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[2]If plaintiff were to allege that he had knowledge of the defendants' fraud because he had entered into a conspiracy with them, that would also serve to place in proper focus the standing issue defendants have raised. The question would then be framed whether a person who has been found guilty of a substantive offense that also constituted an overt act of a broad conspiracy can bring suit under the FCA.

merely use his knowledge of the type of bid and contract documents used in the industry as a means to root through the defendants' files to determine if they contain evidence of fraudulent conduct.

For these reasons, plaintiffs complaint will be dismissed. Plaintiff is granted 21 days in which to file an amended complaint.

Date: October 8, 2002 /s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

[DATE STAMP]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*	
v.	*	Civil No. JFM-00-3459
LEONARD'S DRAPERIES, INC., ET AL.	*	

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ORDER

For the reasons stated in the accompanying memorandum, it is this 25th day of March 2003

ORDERED

1. Defendants' motions to dismiss the amended complaint are granted; and

2. This action is dismissed without leave to amend.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*	
v.	*	Civil No. JFM-O1-240
JOHN CARROW, LTD t/a CRESTHILL DRAPERIES,	*	

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ORDER

For the reasons stated in the opinion issued in the various companion cases (a copy of which is attached hereto), it is, this 10th day of April 2003

ORDERED

1. Defendant's motion to dismiss the amended complaint is granted; and

2. This action is dismissed.

/s/

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*
v.	* Civil No. JFM-00-3459
LEONARD'S DRAPERIES, INC., ET AL.	*
	****
UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*
v.	* Civil No. JFM-01-239
MILL END SHOPS, INC.	*
	****
UNITED STATES EX REL. JEFFREY P. GOLDSTEIN	*
v.	* Civil No. JFM-01-1154
FABRICARE DRAPERIES, INC., ET AL.	*
	****

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v.

SKYLINE MILLS

* Civil No. JFM-01-1155

****

UNITED STATES EX REL.
JEFFREY P. GOLDSTEIN

v.

PANATEX FABRICS, INC.

* Civil No. JFM-01-1156

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MEMORANDUM

In an opinion issued on October 8, 2002, I dismissed the complaint in each of these actions, giving plaintiff leave to file an amended complaint to aver the fraud alleged with particularity, as required by *Fed. R. Civ. P.* 9(b). Plaintiff has now filed amended complaints, and defendants have moved to dismiss them on the ground that plaintiff still has not complied with Rule 9(b).[3]

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[3]All defendants also seek dismissal on the ground that plaintiffs lacks standing to pursue these action under § 3730(d)(3) of the False Claims Act. Further, some defendants have moved to dismiss for lack of personal jurisdiction or improper venue. I need not decide the issues raised by these motions in light of my ruling that plaintiff has failed to comply with Rule 9(b).

In his amended complaints plaintiff asserts four different classes of misconduct in which each of the defendants is alleged to have engaged:

(1) submitting to the government various pieces of false information in order to obtain a "commerciality exemption" to the regulatory requirement that a GSA vendor submit cost or pricing data to the government contracting officer, including (a) false certificates of established catalog or market prices. (b) false "Discount Sales and Marketing Data." and (c) information that concealed discounts and prices that defendants received in connection with commercial sales;

(2) submitting to the government fabricated price lists, again for the purpose of obtaining the commercialility exemption;

(3) falseiy representing that they were entitled to "manufacturer status" in response to solicitations for bids;

(4) substituting products in violation of certifications they submitted to the government.

The basis for plaintiff's allegations that defendants engaged in these classes of misconduct is that he knows they must have done so in order to obtain the contracts they did. His knowledge on that point, in turn, is based upon his knowledge of the nature of the defendants' businesses and his knowledge of the governing regulatory scheme. Plaintiff makes no allegation based on personal knowledge that a particular defendant obtained a particular contract based upon a particular misrepresentation.

In effect, plaintiff is continuing to rely - as he did in his earlier complaints - upon his general knowledge of the industry and applicable government regulations as the sole basis for his allegations. He wants to obtain discovery to obtain particular information in support of those allegations. In my earlier opinion, I ruled that he could not do so. Because plaintiff has not cured the defect in his pleadings I will again dismiss the complaints, this time without leave to amend.[1]

Date: March 25, 2003

/s/
J. Frederick Motz
United States District Judge

[1] The particularly requirement of Rule 9(b) frequently gives rise to a concern that it may result in fraud going undetected because knowledge of the specific facts that would give rise to a fraud claim are exclusively in possession of the defendant. That concern is not present here because the government (which has declined to intervene in all of the actions) has complete knowledge of the representations that defendants made in their bids and other submissions and has had full opportunity to analyze them after having been put on notice of plaintiff's allegations of misconduct.